

I.C.R. asks the Utah Labor Commission to review Administrative Law Judge Hann's decision regarding Ms. R.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. R. was injured while working as a delivery person for Pizza Hut on August 15, 2003. On January 10, 2005, she filed an application to compel Pizza Hut and its insurance company, Ace Insurance (referred to jointly as "Pizza Hut" hereafter) to pay workers' compensation benefits for her injuries.

On August 19, 2005, Judge Hann held an evidentiary hearing on Ms. R.'s claim and then referred the medical aspects of the claim to a medical panel. The panel submitted its final report on January 18, 2006, and Judge Hann issued her decision on February 14, 2006. Judge Hann awarded some disability compensation to Ms. R., but did not include any of Ms. R.'s tip income in computing her compensation rate.

The sole issue presented by Ms. R.'s motion for review is whether her disability compensation rate should reflect both her wages and her tips at Pizza Hut.

DISCUSSION AND CONCLUSION OF LAW

Professor Larson observes that "[i]n computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary, but any thing of value received as consideration for the work, as, for example, tips" *Larson's Workers' Compensation*, § 93.01(2)(a). Professor Larson's statement is consistent with appellate court decisions in nearly every jurisdiction that has considered the issue. The Commission believes that the statement is also true with respect to Utah's workers' compensation system.

Judge Hann found that Ms. R. did, in fact, receive both wages and tips from her work for Pizza Hut. However, because Ms. R. did not report the amount of her tips to Pizza Hut, Judge Hann concluded that "the unreported tips are not income for purposes of this claim." The Commission finds this conclusion to be overbroad. While an ALJ is not required to accept an injured worker's unsubstantiated statements of tip amounts, the fact that tips are not reported to the employer is not necessarily determinative. Instead, all relevant factors must be considered in determining the amount of tips. This is particularly true in a case like this, where it is clear that Ms. R. received some tips.

The Commission remands Ms. R.'s claim to Judge Hann for further consideration. Judge Hann shall take any action necessary to develop an adequate evidentiary record and then issue an

amended decision that decides the amount of Ms. R.'s tip income and computes disability compensation accordingly.

ORDER

The Commission sets aside Judge Hann's decision of February 14, 2006, and remands this matter to Judge Hann for further proceedings and decision consistent with this decision. It is so ordered.

Dated this 31st day of March, 2006.

R. Lee Ellertson
Utah Labor Commissioner